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No. 82-708

IN THE

# Supreme Court of the United States

October Term, 1982

SUMMA CORPORATION,

*Petitioner,*

v.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

*Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of the State of California**

## REPLY BRIEF OF PETITIONER

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## REPLY BRIEF OF PETITIONER

Respondents do not dispute that the decision of the California Supreme Court has enormous importance, potentially affecting vast tracts of land in California. (Pet., pp. 3, 10-11.) Instead, their main thrust is that there is no federal question jurisdiction both because the Equal Footing Doctrine was assertedly first raised in the petition and because the decision below is claimed to involve only state law questions as to the nature and quality of the rights under a confirmed Mexican land grant. In addition, they argue that under federal law, the State's claimed "public trust" property interest was outside the scope of the 1851 Act confirmation process.

## I. FEDERAL QUESTIONS ARE CONTROLLING.

Respondents' position that there is no federal question is based upon a fundamental misunderstanding of the decision of the California Supreme Court. That decision held: (1) that on Mexico's cession of California, the United States "succeeded to the ownership" of a reserved Mexican interest in petitioner's property (App. A-1, p. A-10); (2) that the federal government "retained" this interest when it issued its patent to petitioner's predecessors (*id.*, p. A-15); and (3) that "this interest was acquired by California upon its admission to statehood." (*Id.*)

Although the lower court did not refer to the Equal Footing Doctrine by name, its holding that California succeeded to a purported federal property interest in petitioner's land "upon its admission to statehood" is unmistakably Equal Footing language. *See, e.g., United States* v. *Texas,* 339 U.S. 707, 716 (1950); *Weber* v. *Board of Harbor Commissioners,* 85 U.S. (18 Wall.) 57, 65 (1873); *Pollard's Lessee* v. *Hagan,* 44 U.S. (3 How.) 212, 228-229 (1845). The totality of the opinion leaves no doubt as to the principle being applied. Indeed, while respondents protest petitioner's reference to the Equal Footing Doctrine by its long-established label, they fail to suggest any alternative principle on which to base the purported transfer of the United States' "ownership" to California.[1]

The central issue in this case is whether the State owns the interest it claims in the shallow wetlands belonging to petitioner. The resolution of that issue depends upon whether under the Equal Footing Doctrine such an interest passed from the United States to California upon its admission to the Union. That issue is governed by federal law, as this Court emphasized only last term:

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[1] In the trial court the State's claim to this property interest was also phrased in clear Equal Footing terms. Its cross-complaint asserted that the State "derives its title to and interest in Ballona Lagoon by virtue of its admission on September 9, 1850, as one of the sovereign states of the United States." (C.T. 117.)

> "Federal law governs the scope of title initially vested by the equal-footing doctrine . . . ." *California, ex rel. State Lands Commission* v. *United States,* 102 S.Ct. 2432, 2440n.14 (1982).

*See also State Land Board* v. *Corvallis Sand & Gravel Co.,* 429 U.S. 363, 370-371, 377-378 (1977).

Respondents rely upon *Los Angeles Milling Co.* v. *Los Angeles,* 217 U.S. 217 (1910); *Devine* v. *Los Angeles,* 202 U.S. 313 (1906); and *Hooker* v. *Los Angeles,* 188 U.S. 314 (1903), to support their argument that the issues presented here involve only the nature and extent of rights in land and that these are traditional state law questions.[2] However, these cases have no application in the present context because they were all controversies between competing holders of confirmed Mexican grants over their respective rights in certain waters. In contrast, the State's claimed "public trust" interest has never been confirmed, and the issue is its *existence,* not its nature or extent.[3]

## II. CALIFORNIA'S CLAIMED INTEREST IN PETITIONER'S LAND WAS ABANDONED BY ITS NONASSERTION IN THE 1851 ACT PROCEEDINGS.

In addition to challenging federal jurisdiction, respondents contend that the "public trust" property interest the State

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[2] The State also relies upon *Hyman* v. *State Lands Com'n of State of Cal.,* 543 F. Supp. 118 (C.D. Cal. 1982), *appeal pending,* in arguing that there is no federal question presented by the dispute over ownership of Ballona Lagoon (Br. in Opp., pp. 15-16), but it fails to mention that *Hyman* was decided before the California Supreme Court decision in this case. It is the ground of the supreme court decision, namely that the asserted State property interest was purportedly received from the United States upon California's admission to the Union, that establishes the controlling effect of federal law.

[3] Petitioner does not contend that the Equal Footing Doctrine operates to make every subsequent question concerning land acquired by a State on its admission a federal one. *See State Land Board* v. *Corvallis Sand & Gravel Co.,* 429 U.S. 363, 370-371, 377-378 (1977). On this petition, the issue is not the nature or extent of a recognized state interest, but rather whether California, as successor to the United States, was initially vested upon statehood with the property interest it claims, and that is a federal question. *Id.*

claims in petitioner's land survived the confirmation process notwithstanding that the claim was not presented to the Board of Land Commissioners. Respondents make this argument in an attempt to circumvent the established rule that a claim to land, even if it existed under Mexican law, was abandoned by its non-assertion in the 1851 Act proceedings. *Barker* v. *Harvey,* 181 U.S. 481, 490 (1901); *United States* v. *Title Insurance Co.,* 265 U.S. 472, 484 (1924). In so arguing, respondents confuse the broad "public trust" property interest found by the California Supreme Court with the much narrower navigational easement which exists over privately owned navigable waters.

California law recognizes — and petitioner does not challenge — that there is a public right to traverse and fish navigable waters covering privately owned lands so long as the waters remain navigable. *See Bohn* v. *Albertson,* 107 Cal. App. 2d 738, 741, 238, P.2d 128, 131 (1951). This public right in navigable waters exists without regard to the character of the land at the time of statehood and without regard to whether any interest in the land was ever owned by the State. Reflecting the lack of any State property interest, the public's rights in this respect automatically terminate on the land's loss of its navigable character. *Id.* at 757, 238 P.2d at 140.

In contrast, the expansive "public trust" interest asserted by California is a permanent property interest which persists regardless of any change in the character of the land.[4] *Marks* v. *Whitney,* 6 Cal. 3d 251, 259-260, 98 Cal. Rptr. 790, 795-796, 491 P.2d 374, 379-380 (1971); *City of Long Beach* v. *Mansell,* 3 Cal. 3d. 462, 486-487, 91 Cal. Rptr. 23, 40, 476 P.2d 423, 440 (1970). It accordingly permits the State to utilize non-navigable and even dry land to the exclusion of the "fee" owner.[5]

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[4] Respondents do not dispute that California's tidelands "public trust" is a broad interest in property which gives the State the right to "possess" and even to "preserve" petitioner's land as open space without payment of compensation. (Pet., pp. 6, 10-11, 13.)

[5] Prior to the decision in the present case, the California courts had never suggested that this state property interest could arise in tidelands which the State never owned in fee. *See, e.g., People* v. *California Fish Co.,* 166 Cal. 576, 138 P. 79 (1913).

Despite the breadth of the claimed "public trust" property interest, respondents argue that it is not a claim to land required to be confirmed by the Board of Land Commissioners under the 1851 Act. The core of the argument is the assertion that the 1851 Act did not require presentation of a claim to land less than a full fee.[6] (Br. in Opp., pp. 18-20.) In so claiming, respondents mistakenly rely on language in *Fremont* v. *United States*, 58 U.S. (17 How.) 541 (1854), and *Townsend* v. *Greeley*, 72 U.S. (5 Wall.) 336 (1866).

The dictum respondents quote from *Fremont* is to the effect that mining rights were not within the jurisdiction of the Board of Land Commissioners. However, when that precise issue was ripe for decision, in *United States* v. *Castillero*, 67 U.S. (2 Black) 17, 166-169 (1862), this Court did not adhere to the *Fremont* dictum, but held that a claim to a mining right or privilege is a claim to land within the jurisdiction of the Land Commissioners under the 1851 Act. Thus, *Fremont* does not support the proposition that a property interest as extensive as California's "public trust" could be withheld from the 1851 Act proceedings and then asserted more than 100 years later.

The State's reliance on *Townsend* is similarly misplaced. *Townsend* held that, as between a Mexican grantee and third persons, an 1851 Act proceeding was not determinative of the capacity — trustee or beneficial owner — in which the grantee held title. But here there is no issue as to the capacity in which petitioner's predecessors held their title, and no claim that they held title as trustees. Rather, the California court's decision is that the State — as trustee — owns an interest in petitioner's land. *Townsend* is not authority that the 1851 Act proceedings lack conclusive effect simply because the State claims to be

[6] This claim is, of course, inconsistent with this Court's holdings in *Barker* v. *Harvey*, 181 U.S. 481 (1901), and *United States* v. *Title Insurance Co.*, 265 U.S. 472 (1924), that the failure to present a claim to a right of occupancy constituted an abandonment of the claim.

acting as "trustee" of the public in asserting an interest in former Mexican grant lands.[7]

On the contrary, the requirement of presentation to the Board of Land Commissioners applies as much to state Equal Footing claims in derogation of Mexican grants as to competing private claims. *Knight* v. *United States Land Association,* 142 U.S. 161, 184 (1891). The state supreme court's failure to so hold warrants examination by this Court.

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[7] The State also cites *New Orleans* v. *United States,* 35 U.S. (10 Pet.) 662 (1836), and *Eldridge* v. *Trezevant,* 160 U.S. 452 (1896), but they are no support for the assertion that the "public trust" property interest could be withheld from the 1851 Act proceedings. Those cases both arose in Louisiana where, as explained in *Fremont* v. *United States,* 58 U.S. (17 How.) 541, 553-556 (1854), a very different statute and grant system governed. *New Orleans* involved questions of title to certain land in the city and the federal government's attempted exercise of police power over the land. *Eldridge* involved Louisiana's levee servitude which attaches to lands on the shores of rivers subject to overflow. Although the opinion adverted to French and Spanish precursors of this servitude, the law of the prior sovereigns was held to be irrelevant because the levee servitude, as expressly created by the Louisiana Civil Code, was a valid exercise of state police power. 160 U.S. at 463-464, 468-469.

## CONCLUSION

For these reasons, and the reasons set forth in the petition, a writ of certiorari should issue to review the judgment and opinion of the California Supreme Court.

Respectfully submitted,

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